

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





# NO. 75-6101

No. 75-6101

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

HERMAN DUARTE,

Plaintiff-Appellant,

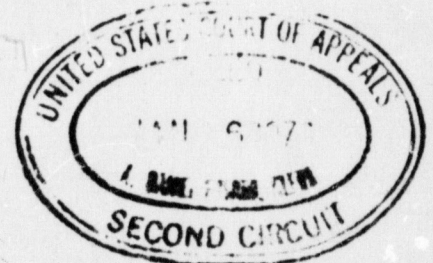
v.

UNITED STATES OF AMERICA ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES



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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 75-6101

HERMAN DUARTE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR THE APPELLEES

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QUESTION PRESENTED

Whether a merchant seaman can maintain a damage action against the United States for wages lost as a result of the Coast Guard's allegedly unlawful revocation of his Merchant Mariner's Document.

STATEMENT OF THE CASE

Nature of the Case

Plaintiff is a merchant seaman who surrendered his Merchant Mariner's Document to United States Coast Guard authorities in Vietnam after having been arrested and charged with possession

of narcotics by local Vietnamese authorities. His seaman's card was ultimately returned to him, and plaintiff now seeks wages lost as a result of the Government's allegedly wrongful deprivation of his Document. The district court denied him money damages, and plaintiff now appeals.

#### The Facts

The essential facts are not in dispute. On October 5, 1972, plaintiff-appellant Herman Duarte, a merchant seaman then serving aboard the SS. American Charger, was arrested by local authorities in the Binh Dinh province of South Vietnam. Duarte was charged with narcotics and currency violations, and held in a Vietnamese jail for eight days. After his release from confinement on October 13, 1972, Duarte returned to his ship. The following day, October 14, 1972, Duarte met with Commander Dorwin Newman and Chief Petty Officer Donald Cooper of the United States Coast Guard. At that meeting, the narcotics charges were discussed and Duarte was informed that he could either request a Coast Guard hearing regarding the possible revocation of his Merchant Mariner's Document, or voluntarily surrender the Document. (Newman's Affidavit, p. 28A; Cooper's Affidavit, p. 30A.) Duarte chose to surrender the Document. After plaintiff was read the three-sentence Voluntary Surrender Agreement (reproduced at p. 12A) and Duarte took the time to read it himself (pp. 28A, 30A), he signed it. Neither Coast Guard officer present noticed that Duarte acted abnormal, irrational, or failed to comprehend the nature and substance of the proceeding (pp. 28A, 30A).



The criminal proceedings before a Vietnamese Court in Duarte's case were held on October 18, 1972. In addition to Duarte, the trial was attended by Chief Petty Officer Cooper and Boson's Mate Crowley of the Coast Guard, and the shipping agent representing the ship (p. 30A). Chief Petty Officer Cooper stated in his affidavit that Duarte, aided by a court interpreter "who spoke perfect English", answered several of the Vietnamese judge's questions and admitted the truth of the charges (p. 30A).<sup>1/</sup> Duarte's recollection of the proceedings is somewhat different (p. 41A). In any event, the Vietnamese court found Duarte guilty and fined him 5000 piastres (which was paid by the shipping company's agent, App. 41A, ¶ 16), and Duarte was released.

Plaintiff claims that he requested return of the Merchant Mariner's Document from Commander Newman while still in Vietnam, which request he alleges was refused (p. 41A, ¶ 16).<sup>2/</sup> After his return to the United States, Duarte through counsel sought to have the Document returned, but the request was denied. Duarte then filed this suit for recovery of the Document and

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<sup>1/</sup> Duarte was charged and found guilty of using marijuana (p. 13A).

<sup>2/</sup> Commander Newman's affidavit contains no mention of such a request (p. 28A).

for lost wages. While this action was pending, the Coast Guard Clemency Board reissued Duarte's Document on December 23, 1974, approximately one year before he could otherwise have applied for another Document.

District Court Proceedings

Plaintiff filed this case (73 Civ. 2461) in the United States District Court for the Southern District of New York on June 4, 1973. Jurisdiction was alleged under 5 U.S.C. §§ 702-706 (APA). The relief he sought was return of the Merchant Mariner's Document, and the "monies lost by the plaintiff, which he would have earned had he had his Merchant Mariner's Document" (Complaint, ¶'s 3, 13). Cross motions for summary judgment were filed with supporting affidavits (pp. 3A-43A), but as noted above the Clemency Board reissued the Document on December 23, 1974, at which time the district court had not yet ruled on the summary judgment motions.

As a consequence of the Document's return, the Government moved for judgment on the pleadings pursuant to Rule 12(c), F.R.C.P., on the ground that the only remaining relief sought by Duarte was money damages which plainly could not be granted under the APA (p. 44A). Duarte opposed the motion and filed an amended complaint in which he asserted that the district court had jurisdiction to award money damages pursuant to 28 U.S.C. 1346(a)(2), and the Fifth Amendment (p. 45A, ¶ 3). The district court ultimately granted plaintiff leave to file the amended complaint, and granted the Government's motion for summary judgment (p. 48A). Plaintiff's timely motion for reconsideration was denied, and he appeals (p. 62A).



## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved are reproduced in the addendum to this brief.

## ARGUMENT

### Introduction and Summary

It is the plaintiff's claim in this case that the United States is liable for wages he allegedly lost from private employers when the Coast Guard erroneously accepted his surrender of his Merchant Mariner's Document. Plaintiff asserts no statute or regulation which even suggests that Congress has accorded him a right to relief in these circumstances. Instead, he argues that the Coast Guard's acceptance of his Document denied him "due process of law," and seeks money damages under the Tucker Act, 28 U.S.C. 1346(a)(2), on the basis that he is stating a "claim . . . founded upon the Constitution." In fact, no recovery is possible here since plaintiff has misconstrued both the gravamen of his claim and the extent of Tucker Act jurisdiction upon which he relies.

As a threshold matter, we shall demonstrate that plaintiff is simply incorrect in asserting that the Coast Guard wrongfully accepted the voluntary surrender of his Document. This disposes of plaintiff's suit since absent his "constitutional claim," he does not even state a claim within the literal purview of the Tucker Act. More fundamentally, the essence of plaintiff's claim is a garden-variety tort which is explicitly excluded from the district court's review under the Tucker Act since 28 U.S.C. 1346(a)(2) excludes claims "sounding in tort." Properly analyzed under the Federal Tort Claims Act, this suit is unquestionably barred by failure to file an administrative claim and by several of the specific exceptions to the Tort Claims Act. In any event, the Tucker Act has not been construed to encompass constitutional claims of the nature asserted here.



I

DUARTE VOLUNTARILY WAIVED HIS RIGHT  
TO A HEARING.

The predicate for plaintiff's suit is his assertion, adopted by the district court, that he was deprived of a right to a hearing with regard to the revocation of his Merchant Mariner's Document. If the Court accepts our position that Duarte waived his right to a hearing, then this Court need not reach the jurisdictional arguments in Parts II and III of our brief. The controlling case in this Circuit is clearly Harris v. Smith, 418 F. 2d 899 (C.A. 2, 1969), and we can see no tenable distinctions between the instant case and Harris.

In Harris v. Smith, this Court held per curiam that a merchant seaman does not have "a constitutional right to have counsel at the time of the interview and prior to the surrendering of his Merchant Mariner's Document," and that a hearing was not required because "Harris chose to waive a hearing concerning the charges after he was informed of his right to a hearing and the right to be represented by counsel at such a hearing, and signed a statement effecting the waiver and voluntarily submitting his Document." 418 F. 2d at 901. The undisputed facts in the present case bring Duarte's claim squarely within this Court's ruling in Harris.

The district court, however, found certain distinctions between Duarte's suit and Harris, none of which are persuasive. First, the district court found significance in the fact that Harris had counsel in prior criminal proceedings. Therefore, the court presumed Harris was "aware of the nature and seriousness of the activities with which he was charged both criminally and in the subsequent administrative proceeding" (pp. 52A-53A). Duarte's case was distinguished on the ground that he "never had the advice of counsel . . . and was far away from home among non-English speaking people where he was less likely to obtain any advice" (p. 54A). But this Court's decision in Harris did not turn upon any presumed subjective awareness of the seaman, his prior access to counsel, or the locale; it turned solely upon the ruling that the Sixth Amendment's guarantee of counsel does not extend to proceedings for the revocation or suspension of a Merchant Mariner's Document. 418 F. 2d 901. On that score, Duarte and Harris are indistinguishable.

Second, the district court found that the cases were distinguishable because Harris was "shown a copy of the charges, [and] informed that a hearing was scheduled on a date certain" (p. 53A), while "it does not appear, however, that [Duarte] was shown a copy of the charges or informed of the time or place for the hearing" (p. 54A; citation omitted). We find it somewhat difficult to understand how the court



below could find that Duarte was not given adequate notice of the charges in view of the explicit, handwritten statement on the "Voluntary Surrender Agreement" wherein Duarte acknowledged being "under investigation by the Coast Guard for POSSESSION OF MARIJUANA ASHORE AT QUINHON, RVN . . . ." (p. 12A). Nor does it appear relevant, let alone controlling, that Duarte did not know the precise time and place that the Coast Guard would schedule a hearing for him if he requested it. While a criminal defendant is constitutionally entitled to notice of the precise nature of the charges and the exact time of the hearing, the purpose is to permit the individual an opportunity to prepare his defense. The Constitution surely does not mandate such specificity when the only question is whether the individual requests a hearing at all.

Finally, the court below distinguished Duarte's case from Harris on the ground that "Duarte was not informed that he would be entitled to counsel at that hearing or that the hearing officer would not be required to deprive plaintiff of his license . . . ." (p. 54A). As a threshold factual matter, we see nothing in the Harris case which shows that Harris was told the spectrum of sanctions which could be imposed. Therefore, this cannot stand as a ground for distinction. Similarly, plaintiff alleges that he was not told that he would have the right to counsel at the Coast

Guard hearing. However, the question is not whether Duarte understood he was waiving a right to counsel,<sup>3/</sup> but whether he understood that he was waiving the right to a hearing. On that point, there is no dispute. Moreover, if the procedural safeguards were relevant to Duarte's decision, he presumably would have inquired about them before deciding. Instead, he sat silent at the critical time and now asks this Court to reward him for failing to make enquiries on points he presently claims to be controlling.<sup>4/</sup>

Since Duarte waived a hearing after being informed of the nature of the charges and of his right to a hearing, his waiver was certainly adequate under the less stringent standards applied to Constitutional rights other than those in criminal proceedings. Schneckloth v. Bustamonte, 412 U.S. 218, 235-246 (1973). See also Agur v. Wilson, 498 F. 2d 961, 967 (C.A. 2, 1974), cert. denied, 419 U.S. 1072 (1975). The district court's decision could therefore be affirmed on this ground.<sup>5/</sup>

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<sup>3/</sup> We note that the right to counsel derives solely from the Coast Guard regulations, and is not a constitutional requirement. Harris v. Smith, supra.

<sup>4/</sup> Nor is there any merit to plaintiff's suggestion in the district court that he is entitled to a trial solely on the basis of his allegation that his waiver was not subjectively "voluntary." This same argument was raised and rejected by the district court which entered summary judgment for the defendants in Harris v. Smith, supra, and the district court's decision was of course affirmed by this Court.

<sup>5/</sup> This Court can of course affirm on any ground, "whether or not that ground was relied upon or even considered by the trial court." Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970).



## II

SINCE DUARTE'S ACTION SOUNDS IN TORT, JURISDICTION LIES SOLELY UNDER THE FEDERAL TORT CLAIMS ACT NOT THE TUCKER ACT; AND HIS SUIT IS SPECIFICALLY BARRED BY SEVERAL OF THE EXCEPTIONS TO THE TORT CLAIMS ACT.

### A. Tucker Act Jurisdiction Does Not Extend To Plaintiff's Claim Which Sounds In Tort.

Duarte's amended complaint alleges that he was "induced to voluntarily surrender" his seaman's card to Commander Newman without "a complete disclosure of the consequences of such surrender" and that "Commander Newman, in fact, misrepresented to plaintiff that he would return his document to him in the event he was freed by the Vietnamese judiciary" (Complaint ¶'s 9-11, p. 46A, emphasis supplied). He further alleges that the Government's action caused him \$9,500 in damages, presumably for lost wages. Thus plaintiff has stated a prima facie case of tortious interference with contractual relations or tortious interference with prospective advantage, or both.<sup>6/</sup> W. Prosser, Torts §129, p. 936 at n.32, and §130 (4th ed. 1971). 1 F. Harper & F. James, The Law of Torts, § 6.5-6.11 (1956). Indeed, this

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<sup>6/</sup> The ambiguity results from plaintiff's failure to specify whether he seeks damages for wages which might be earned under a contract then in existence, or wages from future employment contracts he had hoped to make, or both.

We note the possibility that plaintiff has also stated a case of conversion of his Merchant Mariner's Document, W. Prosser, Torts §15 at pp. 81-82 (4th ed. 1971), or misrepresentation, Prosser, supra, § 101. Since it is sufficient for the purposes of the following analysis to determine that plaintiff has stated a claim in tort, we do not discuss whether the plaintiff's suit satisfies all the elements of conversion and misrepresentation.

case is virtually indistinguishable from Dupree v. United States, 264 F. 2d 140 (C.A. 3), cert. denied, 361 U.S. 823 (1959), where a merchant seaman sued to recover wages lost as a result of the Coast Guard's allegedly negligent withholding of a security clearance which barred him from employment in the Merchant Marine during the Korean War. Dupree's claim was aptly characterized by the Third Circuit as "interference with his prospective economic advantage." Id. at 143. See also Myers & Myers, Inc., et al. v. United States Postal Service, et al., C.A. 2 Docket No. 74-2629 (decided December 24, 1975), Slip op. at pp. 1262-1263.<sup>7/</sup>

Because plaintiff seeks damages in an action "sounding in tort," the district court did not have jurisdiction to hear his suit under 28 U.S.C. 1346(a)(2) which specifically excludes from the purview of the Tucker Act all suits "sounding in tort." This is the precise conclusion which the Court of Claims has reached<sup>8/</sup> in analogous cases where

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<sup>7/</sup> We do not discuss the elements of this tort with regard to the law of any particular state since the alleged wrongful act occurred in Vietnam, a foreign country, and the substantive law of Vietnam, would presumably apply, 28 U.S.C. 2674, Richards v. United States, 369 U.S. 1 (1962), if this action were not barred by the "foreign country" exception to the Tort Claims Act, 28 U.S.C. 2680(k). We discuss the "foreign country" exception, p. 15, infra.

<sup>8/</sup> As the text of 28 U.S.C. 1346(a) makes clear, the district court's jurisdiction under this section of the original Tucker Act is identical, except for the amount in controversy, to the basic jurisdiction of the Court of Claims under another section of the Tucker Act, now codified in 28 U.S.C. 1491. Many of the interpretive problems which have arisen under 1346(a)(2) have already been resolved in the Court of Claims or in the Supreme Court on certiorari from the Court of Claims. Consequently, we draw heavily on these cases in interpreting 1346(a)(2). See generally United States v. She-wood, 312 U.S. 584, 587 (1941); Richardson v. Morris, 409 U.S. 464, 465-466 (1973).



individuals sought lost wages for the alleged wrongful denial of security clearances, Kanarek v. United States, 161 Ct. Cl. 37, 41, 314 F.2d 802, 804 (1963), cert. denied, 379 U.S. 838 (1964); Williamson v. United States, 166 Ct. Cl. 239, 245 (1964), or for damages resulting from the alleged wrongful revocation of an air carrier's operating license, Isthmian Airways, Inc. v. United States, 94 Ct. Cl. 598, 601 (1941). Consequently, there was no jurisdiction to hear this tort suit under the Tucker Act,<sup>9/</sup>

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<sup>9/</sup> A district court in this Circuit has ruled that the exception in 28 U.S.C. 1346(a)(2) for tort cases does not apply to claims "founded . . . upon the Constitution." Jaekel v. United States, 304 F. Supp. 993, 998 (S.D.N.Y., 1969). This conclusion is clearly wrong. Jaekel erroneously based its conclusion upon a statement from Dooley v. United States, 182 U.S. 222, 224 (1901), which was effectively overruled by Basso v. United States, 239 U.S. 602, 606 (1916) and United States v. Holland-America Lijn, 254 U.S. 148, 153 (1920).

Any doubt on the proper interpretation of the Tucker Act can be resolved by examining Congressman Tucker's explanation of the Act on the House floor:

Mr. Tucker: The Senate doubted whether there should be full power given in case of tort against the United States and so they qualified it that a claim for a pension and action of tort against the United States should not be within the provisions of the bill. The conferees on the part of the House, after full discussion, agreed to these two modifications of the original bill, and they are incorporated in the substitute we propose.

Mr. Springer: I desire to ask the gentleman from West Virginia, do I understand you to exclude all actions based on torts?

Mr. Tucker: Yes, sir.

18 Cong. Rec. 2678-2679 (March 13, 1887; emphasis supplied).  
(Footnote continued on next page)

and it should have been dismissed for lack of jurisdiction or the district court should have considered plaintiff's complaint under the Federal Tort Claims Act.

B. Plaintiff Is Not Entitled To Relief Under The Tort Claims Act.

If plaintiff's claim is analyzed under the Federal Tort Claims Act, then it is barred for failure to file an administrative claim, and because it falls within several of the specific exceptions to the Act.

1. 28 U.S.C. 2675(a) provides in part "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency . . ." Plaintiff's complaint

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9/ (continued from previous page)

Congress has recently reaffirmed our interpretation of the Tucker Act by providing a remedy under the Federal Tort Claims Act for tortious acts of law enforcement officers which doubtlessly amount to violations of the victims' Fourth and Fifth Amendment rights. See P.L. 93-253, 88 Stat. 50 (March 16, 1974) amending 28 U.S.C. 2680(h). If Congress believed that all violations of Constitutional rights were compensable under §1346 (a)(2) as plaintiff apparently suggests, the amendment would have been unnecessary. Indeed, the legislative history is to the contrary: the Senate Report accompanying the amendment specifically noted that such claims were previously barred by sovereign immunity notwithstanding the fact that they involved violations of Constitutional rights. S. Rep. No. 93-588, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News at pp. 2789-2792.



contains no allegation that he has ever submitted an administrative claim, or that his claim was denied. This defect alone warranted dismissal of his suit. Altman v. Connally, 456 F. 2d 1114, 1116 (C.A. 2, 1972); Caton v. United States, 495 F. 2d 635 (C.A. 9, 1974). See generally, 2 L. Jayson, Handling Federal Tort Claims, §315 (1975 ed.).

2. Assuming the administrative claims procedure had been satisfied, the wrongful act alleged by plaintiff occurred in Vietnam, and would therefore be barred by the "foreign country" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(k), which excludes from the coverage of the Act "[a]ny claim arising in a foreign country." United States v. Spelar, 338 U.S. 217 (1949); Meredith v. United States, 330 F. 2d 9 (C.A. 9, 1964); Callas v. United States, 253 F. 2d 838 (C.A. 2), cert. denied, 357 U.S. 936 (1958).<sup>10/</sup>

3. To the extent plaintiff bases his action on an act which amounts to misrepresentation or wrongful inducement to surrender his documents (see the Amended Complaint ¶'s 9-11, p. 46A and note 6, supra) the suit would be barred by the

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<sup>10/</sup> Nor is there any merit to the argument that if a claim of conversion were proven, the Government's wrongful refusal to return the document constituted a tortious act in the United States and thereby circumvents the "foreign country" exception. The argument has already been rejected. Morrison v. United States, 316 F. Supp. 78, 79 (M.D. Ga., 1970).

misrepresentation exception to the Tort Claims Act, 28 U.S.C. 2680(h). United States v. Neustadt, 366 U.S. 696 (1961); Fitch v. United States, 513 F. 2d 1013(C.A. 6, 1975), cert. denied, 42 U.S.L.W. 3204 (October 7, 1975).

4. While these grounds are dispositive, we believe the suit would also be barred by that portion of 28 U.S.C. 2680(h) which excepts the Government's tort liability from "[a]ny claim arising out of . . . interference with contract rights . . . ." Dupree v. United States, 264 F. 2d 140, 143 (C.A. 3), cert. denied, 361 U.S. 823 (1959). See also Cafeteria Workers v. McElroy, 284 F. 2d 173, 184 n.38 (C.A.D.C., 1960) (en banc) (alternative holding), aff'd on other grounds, 367 U.S. 886 (1961); Asher v. Schlesinger, et al., C.A.D.C. No. 74-2136 (decided December 22, 1975);<sup>11/</sup> Peterson v. Weinberger, 508 F. 2d 45, 49 n.5 (C.A. 5, 1975). Compare Hendry v. United States, 418 F. 2d 774, 779 (C.A. 2, 1969).<sup>12/</sup> Likewise, the "discretionary function" exception, 28 U.S.C. 2680(a), is applicable. Dupree v. United States, 247 F.2d 819 (C.A. 3, 1957).

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<sup>11/</sup> Copies of the Asher decision are being lodged with the Clerk of this Court and served upon opposing counsel.

<sup>12/</sup> Hendry simply held that where the gravamen of plaintiff's complaint is "negligence and malpractice", 418 F. 2d at 779, the fact that a part of the damages sought may be computed with regard to lost wages does not bar the entire suit under the interference with contract rights exception in 28 U.S.C. 2680(h). We do not believe that Hendry should be construed to reject the position adopted by the other circuits cited in the text that where the essence of plaintiff's suit is wrongful interference with contract rights, the suit is barred by 28 U.S.C. 2680(h).



### III

DUARTE DOES NOT STATE A CLAIM "FOUNDED  
... UPON THE CONSTITUTION" WITHIN THE  
MEANING OF THE TUCKER ACT.

Aside from the fact that plaintiff's claim is essentially in tort and ~~is~~ therefore excluded from the district court's Tucker Act jurisdiction, he is simply wrong in asserting that his Constitutional claim is "founded . . . upon the Constitution" within the meaning of the Tucker Act. For the purposes of the Tucker Act, a suit is founded upon "the Constitution, or any Act of Congress, or any regulation" only if the Constitutional provision, the statute or the regulation in question creates a substantive right, enforceable against the United States, for "actual, presently due money damages." United States v. King, 395 U.S. 1, 3 (1969), Glidden Co. v. Zdanok, 370 U.S. 530, 557 (1962). The Act does not itself establish a substantive right, but confers jurisdiction where the substantive provision requires payment of money damages. If plaintiff has a Constitutional claim at all, then it would be for denial of "due process of law" with regard to a "liberty" interest protected by the Fifth Amendment. The appropriate relief in such circumstances would be to order a "due process" hearing, and not to award plaintiff consequential money damages on the unfounded assumption that the hearing would not have resulted in the revocation of the Document. Thus Duarte's Constitutional claim is quite different from the

Constitutional suits generally cognizable under the Tucker Act for the taking of "private property . . . for public use, without just compensation." Even in suits brought under the "just compensation" clause, the recovery is limited to the value of the res at the time of its taking, and does not extend to consequential damages sought here.

If plaintiff is constitutionally entitled to a hearing before the revocation of his Document, then the right to a hearing derives from an invasion of a right to "liberty" under the Fifth Amendment. Board of Regents v. Roth, 408 U.S. 564, 572-575 (1972). Furthermore, his claim is founded upon a violation of the Fifth Amendment's "due process" clause which provides that "No person . . . shall be deprived of life, liberty, or property without due process of law . . . ." Finally, the damages plaintiff seeks are not for denial of his right to a hearing, but for consequential injury he assumes resulted from his denial of a hearing.<sup>13/</sup> To our knowledge, the Tucker Act has never been construed to give a right of recovery in such circumstances; certainly the cases cited by plaintiff and noted by the district court do not support this position.

While our research has not revealed a decision which explicitly limits Tucker Act jurisdiction in "claims . . .

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<sup>13/</sup>Plaintiff premises his entire theory of recovery on the assumption that if a hearing had been held, the result would have been different and he would have retained his Document. No such assumption is warranted. It may well have been that the hearing would have resulted in the revocation of his document. This shows the fundamental flaw in seeking damages under the "due process" clause which mandates not the payment of money but the entitlement to a hearing.



founded upon the Constitution" to claims for "just compensation" for the taking of private property,<sup>14/</sup> the decisions which award damages against the United States can aptly be characterized as "just compensation" cases. Indeed, all of the cases which plaintiff cites as support for his position are in essence cases where an individual seeks compensation for private property appropriated by the Government, although some of the decisions contain statements indicating that the "due process" clause was involved.<sup>15/</sup> Furthermore, the relief granted under the Tucker Act is the value of the property taken and not the consequential damages sought here.<sup>16/</sup> While specifically declining to decide the issue whether a denial of "due process" gives rise to a

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<sup>14/</sup> Eastport Steamship Corp. v. United States, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007-1008 (1967), provides the best definition of the scope of Constitutional claims cognizable under the Tucker Act.

<sup>15/</sup> The majority of the cases cited by plaintiff involve a seizure and forfeiture of personal property (typically a car) usually pursuant to a criminal charge later dismissed. Simons v. United States, 497 F.2d 1046 (C.A. 9, 1974); Pasha v. United States, 484 F.2d 630 (C.A. 7, 1973); Lowther v. United States, 480 F.2d 1031 (C.A. 10, 1973); United States v. One 1965 Chevrolet, 475 F.2d 882 (C.A. 6, 1973); Menkarell v. Bureau of Narcotics, 463 F.2d 88 (C.A. 3, 1972); Jaekel v. United States, 304 F. Supp. 993 (S.D. N.Y., 1969). The two remaining cases involve "inverse condemnation" of land. Smith v. United States, 458 F.2d 31 (C.A. 9, 1972); American Oil Co. v. United States, 383 F. Supp. 1281 (N.D. Okla., 1974). All are classic cases of taking property without "just compensation."

<sup>16/</sup> It is well settled that "compensation under the Fifth Amendment may be recovered only for property taken and not for incidental or consequential losses." R.J. Widen Company v. United States, 174 Ct. Cl. 1020, 1029, 357 F.2d 988, 994 (1966) and cases cited therein.

damage action under the Tucker Act, the court below also cited cases, which it evidently believed gave some support to plaintiff's position (pp. 57A-58A). In fact, these cases as well are totally inapposite.<sup>17/</sup>

The Court of Claims has consistently rejected constitutional claims identical to the one asserted by Duarte, thus confirming our view that the Tucker Act does not provide a jurisdictional basis for plaintiff's suit. E.g., Dupree v. United States, 136 Ct. Cl. 57, 141 F. Supp. 773 (1956); Kanarek v. United States, supra, 314 F.2d at 803-804; Williamson v. United States, supra, 166 Ct. Cl. at 245.

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<sup>17/</sup> Bell v. Hood, 327 U.S. 678 (1946), simply held that alleged deprivation of Constitutional rights "arises under the Constitution" for the purposes of determining jurisdiction under the federal question statute, now 28 U.S.C. 1331(a); the Tucker Act was not at issue. Mr. Justice Brennan's concurring opinion in City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973), was also concerned solely with federal question jurisdiction. Singleton v. Vance, 501 F.2d 429, 433 (C.A. 4, 1974), is even less persuasive since it also involved federal question jurisdiction and Judge Winter's "tentative view" was made in his separate dissenting opinion on a point which he conceded was never briefed nor argued. There is, of course, no precedential value in Cardinale v. Washington Technical Institute, 500 F.2d 791, 796 n.5 (C.A.D.C., 1974) because the court never reached the question. In any event, Tucker Act jurisdiction was not at stake.



CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

REX E. LEE,  
Assistant Attorney General,

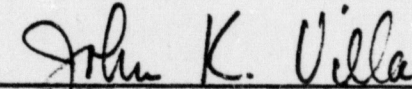
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 1976, I served the foregoing brief upon counsel for the appellant by causing two copies to be mailed, postage prepaid, to:

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ADDENDUM





## CONSTITUTION

### AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28, U.S.C. provides in pertinent part:

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.



**§ 2674. Liability of United States**

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

**§ 2675. Disposition by federal agency as prerequisite; evidence**

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.





**§ 2680. Exceptions**

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.